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No. 252

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

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L. L. McGUIRE AND LENORE McGUIRE, *Petitioners*

VERSUS

A. W. TODD, ET AL., *Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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L. L. McGUIRE
LENORE McGUIRE
*Petitioners*
2531 Marvin
Dallas, Texas

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*To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Your Petitioners respectfully represent:

## STATEMENT OF THE MATTER INVOLVED

On November 15, 1951 petitioners filed a damage suit—*no equitable relief asked*—for deprivation of civil rights, a

right of action created by USCA Title 8, Sections 43, 47(3), 48, against the following officers and employees of the Dallas, Texas, City Government.

A. W. Todd, Fire Inspector

F. W. Rhea, Fire Inspector

W. G. Burns, Fire Marshall

Frank O'Brien, City Judge

W. K. Chapman, Assistant City Attorney

Robert McBean, Assistant City Attorney

H. P. Kucera, City Attorney

On June 30, 1952 the Court of Appeals, Fifth Circuit, affirmed the judgment without opinion of the District Court, the gist of the appellate opinion being:

> ". . . we disregard, as mere conclusions, the loose and general, the factually unsupported characterizations of the complained of acts of the defendants as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights, that the things defendants are alleged to have done, as distinguished from the conclusions of the pleaders with respect to them, do not constitute a deprivation of the civil rights of plaintiffs." (R. 80)

Petitioners alleged their federal rights violated were:

1. Right to privacy, to be let alone in the home, to be free from unreasonable and exploratory search in the home and curtilege by city law enforcement officers, ab-

sent any emergency and without search warrant or other legal process. (R. 3, 7-10, 13)

2. Right to be free from being arrested, prosecuted, tried, convicted, sentenced, for an act that had never been made penal by written law, in retaliation for insisting on and exercising their constitutional right of privacy. (R. 4, 10-12, 13-14)

3. Right to equal protection of Texas Constitution, Article 1, Section 9, "security against unreasonable searches" (app. iii) and Texas Penal Code, Article 3, (app. iii), ". . . no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State". (R. 3, 5, 6, 11, 12)

In 1948 the Dallas City Council enacted a Fire Code Ordinance which:

1. Authorizes entry of firemen into any building without search warrant or legal process, absent any emergency, Art. 34-7, 34-15 (R. 29, 33) but nowhere makes it a penal offense to refuse entry.

2. Authorizes taking of evidence by firemen while in any building, Art. 34-15. (R. 33)

3. Defines many penal acts and prescribes penalties, Ordinance Title. (R. 17)

4. *Makes all firemen law enforcement officers, Art. 34-5 (R. 27)*

Two fire inspectors acting under authority of above ordinance, without search warrant or other legal process and absent emergency entered petitioners *home* and garage, all within the curtilege, without the owner's, L. L. McGuire's, permission after being instructed they were not to enter, and succeeding only by compelling Lenore McGuire to let them do so. (R. 9, 10, 13) This entry was made as an exploratory search to seek out evidence and law violations of any nature. (R. 13)

Because Lenore McGuire refused to unlock the garage door she was arrested, prosecuted, convicted by the city judicial officers on a charge of violating *Art. 34-7 Fire Code which defines no penal act and sets no penalty. (R. 10-14, 29)* Only after she appealed to the County Court was the case dismissed. (R. 13)

Respondents acts were done in furtherance of a conspiracy to deprive petitioners of their federal rights and in alternate if not a conspiracy at least subjected them to the actual deprivation of these rights. (R. 5, 6)

It was further alleged that in the deprivation of their rights respondents intentionally discriminated against petitioners and did not accord them protection of law equal to all other citizens. (R. 3, 5, 6, 14, 15)

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered June 30, 1952. The jurisdic-

tion of this Honorable Court is invoked by virtue of Title 28 USCA 1254 (1).

## QUESTIONS PRESENTED

(Questions 1-5 Argued in Both Lower Courts)

1. Is the security of one's privacy in home and curtilege against arbitrary intrusion by city law enforcement officers, affirmatively sanctioned by city ordinances, a federal right protected by the Fourteenth Amendment and redressed by a Civil Rights Acts damage suit?

2. Is the right to be arrested, tried and convicted only on a predetermined standard of conduct, a written penal statute, a federal right protected by the Fourteenth Amendment and redressed by a Civil Rights Acts damage suit?

3. Is the right to be free from *unauthorized and illegal* retaliation by state and city agents for insisting on and exercising the federal right of privacy, protected by the Fourteenth Amendment and redressed by a Civil Rights Acts damage suit?

4. Is the right to equal protection of the search provisions of the Texas Constitution, and the Texas Penal Code definition of a penal act, a federal right whose deprivation, or damage resulting from conspiracy to deprive, may be redressed by a Civil Rights Acts damage suit?

5. Are city agents and judicial officers immune from a civil rights damage suit when their unauthorized acts result in deprivation of Federal rights?

6. Can a pleader rely on Federal Rule 9b, which allows malice, intent, purpose and knowledge to be averred generally?

## SPECIFICATIONS OF ERROR AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

**1. The Court of Appeals has erroneously decided in the negative important questions of Constitutional law which have not yet but should be settled by this Court—Does the Civil Rights Acts authorize a damage suit against state officials for unreasonable search or home and curtilege, for ILLEGAL retaliation against the citizen for asserting that right of privacy, and for a citizen's arrest, trial and conviction not on a standard of conduct predetermined by written penal law?**

**2. The Court of Appeals has erroneously ruled that the Civil Rights Acts do not authorize a damage suit for deprivation of Federal rights against state agents in the discharge of their official duties in conflict with the decisions of other Circuit Courts and applicable decisions of this Court.**

**3. The Court of Appeals has erroneously ruled that the Civil Rights Acts do not authorize a damage suit against city officials for denying equal protection of state law in conflict with Snowden v. Hughes, 321 US 1, and Burt v. City of New York, 156 F. (2) 791 (2 cir.).**

**4. The Court of Appeals has departed from the usual course of judicial procedings, so as to call for this Court's supervision, in negating Rule 9b. "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." holding, "we disregard as mere conclusions, the loose and general, the factually unsupported characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights." (R. 80)**

## CONCLUSION

A writ of Certiorari should be issued by this Honorable Court for the reasons stated, so that the citizen's right of privacy, to be free from unlawful searches, now generally ignored, may once again be revived and restored to its proper position among the fundamental rights.

L. L. McGuire
Lenore McGuire
*Petitioners*
2531 Marvin St.
Dallas, Texas

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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There was no written opinion by the District Court and the Circuit Court opinion is not yet reported but is set out in Record at page 76. Grounds of Jurisdiction, Specifications of Error, and Statement as set out in Petition are adopted and will not be repeated. The Appendix contains the Statutes involved.

## SUMMARY OF ARGUMENT

This Court in *Wolf v. Colorado*, 338 US 25 and *Stefanelli v. Minard*, 96 L. Ed. 99, while holding that the

use in state criminal trials of evidence seized in unlawful search was not the deprivation of a federal right, and while refusing to prohibit its use in state courts, did hold as dicta, that the entry and search itself was a deprivation of liberty without due process which could be redressed by a damage suit brought under the Civil Rights Acts. Upon this dicta is bottomed the first ground of petitioners' complaint. The City of Dallas, by ordinance, sanctioned law enforcement officer's incursion into the privacy of petitioners' home and curtilege, and acting by authority of this ordinance respondents did invade their home and curtilege without permission, warrant or emergency. Petitioners were violating no law, the officers found no incriminating evidence, and no criminal proceedings are now or have been pending or threatened, except of course, the illegal arrest and charge for refusing to at first permit the search, which was long ago dismissed. Here for the first time this Court can determine whether or not the right of privacy in the home is a federal right whose deprivation can be redressed by a damage suit under authority of the Civil Rights Acts without in any manner interfering in state criminal trials.

Secondly the unauthorized arrest, trial and conviction of Petitioner Lenore McGuire on charge of violating Art. 34-7 (R. 29) which was not even a penal ordinance, in retaliation and as punishment for refusing to aid the deprivation of her right of privacy—refusing to unlock the door—was a deprivation of a federal right upon two legal

theories, first as expounded by Judge Hand in *Bomar v. Keyes*, 162 F (2) 136, since it was punishment in retaliation for exercising a federal right, second as set out by Chief Justice Vinson in *Jordan v. DeGeorge*, 341 US 223, at 230, because the ordinance failed to give due notice that the act of refusing entry had been made criminal before it was done.

Thirdly petitioners were deprived of equal protection of the search provision of the Texas Constitution and Texas Penal Code Article 3 requiring penal laws to be written, which according to the rule announced in *Snowden v. Hughes*, 321 US 1 and as interpreted in *Burt v. City of New York*, 156 F (2) 791, is a deprivation of a federal right that may be redressed by a civil rights damage suit. Intentional and purposeful d i s c r i m i n a t i o n throughout the complaint was alleged.

To say that state agents are immune to a civil right damage suit as the Appeals Court has in effect done, is to nullify and negate the act whose very purpose is to make them liable when they carry out the provisions of a state law that deprives federal rights, and since *Screws v. U. S.*, 325 US 89, even when they act in violation of the state law.

Also the Appeals Court herein by striking down petitioners' complaint on the theory that malice, conspiracy and purpose cannot be averred generally, nullified Rule 9b., and condemning their complaint because it contains

conclusions, (petitioners say they averred Malice etc. in detail and the conclusions are ultimate statements of fact) have unsettled and violated both the spirit and letter of the current rules.

## ARGUMENT

### I

### THE RIGHT OF PRIVACY IN THE HOME AND CURTILEGE IS A FEDERAL RIGHT WHOSE DEPRIVATION BY STATE AGENTS CAN BE REDRESSED BY A DAMAGE SUIT UNDER AUTHORITY OF CIVIL RIGHTS ACTS

The Fourth Amendment was held applicable to the States and their agencies by virtue of the Due Process Clause of the Fourteenth by the Supreme Court in *Wolf v. Colorado*, 338 US 25, 27; 93 L. ed. 1783, 69 S. Ct. 1359, and *Stefanelli v. Minard*, 96 L. ed. 99, wherein the Court said:

> "Petitioners invoke our decision in Wolf v. Colorado, 338 US 25, 93 L. ed. 1782, 69 S. Ct. 1359. The precise holding in that case was "that in a prosecution in a state court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure." Id. 338 US at 33, 93 L. ed. 1788, 69 S. Ct. 1359. Altho our holding was thus narrowly confined, in the course of the opinion it was said: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is

basic to a free society. It is therefore 'implicit in the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause . . ." Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment." Id., 338 US at 27, 28; 93 L. ed. 1785, 1786, 69 S. Ct. 1359. There was disagreement as to the legal consequence of this view, but none as to its validity. We adhere to it. . ."

"Discretionary refusal to exercise equitable power under the Act (Civil Rights) to interfere with State criminal prosecution is one of the devices we have sanctioned for preserving this balance. Douglas v. Jeannette, 319 US 157; 87 L. ed. 1324; 63 S. Ct. 877, 882. And under the very section now invoked, we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages. Compare Giles v. Harris 189 US 475, 47 L. ed. 909, 23 S. Ct. 639, with Lane v. Wilson, 307 US 268; 83 L. ed. 1281; 59 S. Ct. 872."

It is immaterial that the illegal search is made by other than a police official. The United States Court of Appeals for the District of Columbia, in *District v. Little*, 178 F (2) 13, 14, affirmed on other grounds 339 US 1, 94 L. ed. 599, 70 S. Ct. 468 said:

"Appellee refused to unlock the front door of her home at the command of a Health Department inspector who was without a warrant. The question is whether she was within her Constitutional rights in doing so, or whether she thereby illegally hindered him in the performance of his duty . . . The Fourth

Amendment to the Constitution applies. The Supreme Court has several times in recent cases exhaustively and emphatically discussed the invasion of private dwellings by government officers. If there ever was any doubt upon the matter, it has surely now been laid to rest. . . We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so, or (2) an immediate major crisis in the performance of duty affords neither time or opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite."

"Distinction between "inspection" and "search" of a home has no basis in semantics, in constitutional history, or in reason. "Inspect" means to look at, and "search" means to look for. To say that the people, in requiring adoption of the Fourth Amendment, meant to restrict invasion of their homes if governmental officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealing with potential tyranny."

The argument of the District that a distinction should be made between health inspectors and general law enforcement officers was rejected by the Court of Appeals. However no such question arises herein because the ordi-

nance specifically makes the firemen law enforcement officers in the following language: (R. 27)

> "Art. 34-5 Duties and powers of the fire chief and firemen.—It shall be the duty of the Fire Chief and all other men of the uniformed and non-uniformed force of the Fire Department to enforce all laws and ordinances of the State of Texas and the City of Dallas covering the following:
>
> a. The prevention of fire.
>
> b. The storage and use of explosives and inflammables.
>
> f. The investigation of the cause, origin and circumstances of fires as provided elsewhere in this ordinance."

Reference to the Title of the Fire Code (R. 17) shows that there are many penal laws relating to fire prevention. Furthermore Article 212, Texas Penal Code is as follows:

> "A peace officer *or any other person*, may without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is classed as a felony, or as an offense against the public peace."

In short a specialized law enforcement officer such as a fire inspector can accomplish anything a general police officer, although perhaps with more difficulty in some instances.

The evil sought to be prevented is the presence of a state agent with power and duty to place the liberty and

property of the citizen in legal jeopardy irrespective of what law he is enforcing. If the state agent has the power and it is made his duty to decide whether or not the citizen shall be subjected to penal or forfeiture, summary or court proceedings, and to gather evidence to support that action, then his presence without permission, emergency or magistrate's warrant is a violation of the Fourth and Fifth Amendments.

While both the home and garage were entered both have the same right of privacy. In *Taylor v. U. S.* 286 US 1, a garage was so protected, the location being:

> "The garage—a small metal building is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are parts of the same premises."

Today a garage is just as much a part of the living as the living room, taking the place of the attic and cellar of the previous generation, often it is under the same roof.

Petitioners' alleged (R. 13): "The three inspections set out in the complaint were made not only as fire inspections but primarily as exploratory searches with the purpose of discovering law violations of whatever nature and to secure evidence to support a criminal action against these plaintiffs of these and other violations." *This is an allegation of fact and not a conclusion of law, and is made in good faith.* The purpose of Warrants is to determine the necessity of search and to limit its scope, evils that

immediately arise when the magistrates restraining hand is dispensed with.

Law enforcement officers thruout the country indifferently observe the search provisions of the state and federal constitutions, sometimes entering by force, more often by bullying the householder, and even by enlisting the illegal aid of the state judiciary to chastise the stubborn citizen, as in the instant case. Theoretically the outraged householder can sue in the state courts and there are early cases to that effect, but with the growth and power and influence of city governments over legislatures and courts in recent decades, the law of public officials' immunity has become so warped in their favor as to eliminate any chance of success. The Civil Rights Acts abrogated the immunity of *state* officials and furnishes the only effective means of redress, hence the growing use of it in recent years, and the effort on the part of state officials to get the Federal Courts to nullify it by engrafting immunity law on to it, as the Court of Appeals has done in effect in the case at bar.

A strong opinion reinforcing the dicta of the Wolf and Stefanelli cases, which the Fifth Circuit has refused to follow, would do much to restore the almost extinct right of privacy to the American people.

## II

## RETALIATION BY STATE OFFICERS AGAINST A CITIZEN FOR EXERCISING HIS FEDERAL RIGHTS MAY BE REDRESSED BY A CIVIL RIGHTS DAMAGE SUIT

Petitioner Lenore McGuire was illegally arrested, tried, convicted and on appeal cause was dismissed. (R. 10-14) Judge Hand in *Bomar v. Keyes*, 162 F (2) 136, held that where a teacher was discharged for exercising her right to serve on a federal jury she had a right of action against the superior who discharged her.

> "True, the plaintiff did serve upon the jury—literally, she was not "prevented" from doing so—but it would emasculate the act either to deny protection against reprisal to those whom threats did not deter, or to leave without recourse those who were later made the victims of reprisals of which they had not been warned."

The Court of Appeals in *Brandhove v. Tenney*, 183 F (2) 121, 124, where Brandhove sought damages for retaliatory action by Tenney and others, said:

> "But the statute in question (8 USCA 43) must be conceded a more liberal range in that appellant is entitled not only to exercise the right but to be protected against official reprisal for having exercised it."

This Court although reversing the case upheld the principle saying legislative immunity was absolute as long

as the legislators stayed within proper limits of legislative action. Herein the city judicial officials acted without authority in trying petitioner on a civil ordinance.

## III

## THE RIGHT TO BE ARRESTED, TRIED AND CONVICTED BY STATE OFFICIALS ONLY ON A PREDETERMINED STANDARD OF CONDUCT, IS A FEDERAL RIGHT, REDRESSED BY A CIVIL RIGHTS DAMAGE SUIT

Petitioner Lenore McGuire was charged and tried on Art. 34-7, not a penal ordinance nor prescribing a penalty. (R. 29) Mr. Chief Justice Vinson in *Jordan v. DeGeorge*, 341 US 223, 95 L. ed. 886, 71 S. Ct. 703; at 230 said:

> "The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. Williams v. United States, 341 US 97, 95 L. ed. 774, 71 S. Ct. 576, decided April 23, 1951; Screws v. United States, 325 US 91, 103, 104; 89 L. ed. 1495, 1503, 1504; 65 S. Ct. 1031, 162 ALR 1330 (1945). This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivation of due process of law, Lanzetta v. New Jersey, 306 US 451; 83 L. ed. 888; 59 S. CT. 618 (1939); United States v. Cohen Grocery Co., 255 US 81, 65 L. ed. 516, 41 S. Ct. 298, 14 ALR 1045 (1921). It should be emphasized that this statute does not declare certain conduct to be criminal."

In *McShane v. Moldovan*, 172 F (2) 1016, (6 cir.) McShane alleged that pursuant to the conspiracy of Judge, witness, constable and others, she was illegally arrested without warrant, subjected to a fraudulent trial and obtained her freedom only on appeal. The Court of Appeals held she stated a valid claim under the Civil Rights Acts.

In instant case petitioner alleges that pursuant to a conspiracy of the fire inspectors, city attorneys and city judge, she was arrested, tried and convicted, on a charge of violating Art. 34-7 (R. 29), neither a penal ordinance nor prescribing a penalty; and she obtained her freedom only on appeal.

The Fourteenth Amendment requires due process in state criminal trials only in the primary sense—certain basic fundamentals—one of which is a written penal law by which the accused could have been forewarned before he commmitted the act, the principle underlying the ex post facto provision which is applicable to the states. Constitution Article 1, Section 10 reads: "No State shall . . . pass any . . . ex post facto law . . ." From this all American citizens have a federal right not to be tried until a criminal law is written defining the crime and affixing the penalty. The Court of Appeals herein erred in failing to distinguish between this due process in the primary sense and mere errors of law, innocent or intentional, of the authorities cited in the footnote (R. 79) which were in civil suits in which the state only furnished

the forum, whereas in the McShane and McGuire cases the State was seeking to convict the defendants.

## IV

## THE DOCTRINE OF IMMUNITY OF STATE JUDICIAL OFFICIALS HAS NO APPLICATION WHERE THE ABUSE OF STATE POWER RESULTS IN DEPRIVATION OF FEDERAL RIGHTS.

The dissenting opinions in the Screws case at 325 US 142 points out Congress in 1866 considered the liability of judicial officers and held they would be liable:

> "In particular, opponents of the Act were troubled lest it would make criminals of State judges and officials for carrying out their legal duties. Senator Trumbull agreed that they would be guilty if they consciously helped to enforce discriminatory State legislation."

In *Shelley v. Kraemer*, 334 US 1, Chief Justice Vinson said at page 18:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the amendment has reference includes action of state courts and state judicial officials . . . It has never been suggested that state court action is immunized from the operation of those provisions simply because the Act is that of the judicial branch of the State Government."

The Third Circuit Court in *Picking v. Penn. Ry.*, 151 F (2) 240, cert. denied 332 US 776 held a judge liable in a civil rights suit at page 250:

> "We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the Third Civil Rights Act explicitly applies to any person. R. S. Section 1979 applies to "every person". We can imagine no broader definition. The statute must be deemed to include members of the State Judiciary acting in official capacity."

The Sixth Circuit Court upheld a damage judgment against a state judge in *Manning v. Ketcham*, 58 F (2) 948 where he ordered a witness imprisoned without authority. In the leading case of *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, at page 352 sets out the rule that a judge is immune if he acts within the scope of his authority and liable if he acts without authority. The city judicial officers in case at bar are liable for two reasons, first they acted without authority, second they deprived petitioners of their federal rights. All the authorities cited by the Appeals Court referred to *Federal officers to which the Civil Rights Acts do no apply.*

## V

## FAILURE TO AFFORD PETITIONERS EQUAL TREATMENT UNDER STATE LAW, EQUAL RIGHT TO PRIVACY OF THE HOME AND TO BE TRIED ON

## A PREDETERMINED STANDARD OF CONDUCT WAS A DEPRIVATION OF THEIR FEDERAL RIGHTS

The complaint throughout alleges an intentional and purposeful discrimination, that they were not accorded the rights of which they were deprived equal to other citizens, (R. 3, 5, 6, 14, 15) and complies with the rule of *Snowden v. Hughes*, 321 US 1, and as interpreted in *Burt v. City of New York*, 156 F (2) 791 (2 cir.):

> "These allegations go further than merely to assert that the plaintiff has been the victim of deliberate abuse of power by state officials, which would not be enough. They assert that he is the victim of a "purposeful discrimination" being, if not the only architect so practised upon, at least one, who has suffered what others have in general escaped. Indeed the concluding allegations are that the defendants' treatment of the plaintiff was actuated by personal hostility.
>
> "Whatever may have been true before, it seems to us that, since the decision of the Supreme Court in Snowden v. Hughes, 321 US 1, 64 S. Ct. 397, 88 L. ed. 497, such allegations will support an action under section 43 and 47 (3) of title 8, over which section 41 (14) of Title 28 USCA gives the district court jurisdiction . . . but the decision definitely settled it, that, if a complaint charges a state officer, not only with deliberately misinterpreting a statute against the plaintiff, but also with purposely singling out him alone for that misinterpretation, it is good against demurrer."

## VI

## THE COMPLAINT'S GENERAL ALLEGATIONS OF MALICE, INTENT, KNOWLEDGE CONSPIRACY ARE SUFFICIENT TO SUPPORT CLAIM FOR DAMAGES UNDER FEDERAL RULE 9(b)

This complaint is primarily brought under authority of USCA, Title 8, Section 43 (app. i.) which requires no allegation of conspiracy, malice, purpose or intent, only that a federal right has been violated. Seeking to recover also under Section 47(3) and 48, conspiracy, malice, intent, and knowledge, are alleged both generally and in detail (R. 3, 5, 6, 7, 9, 11, 13-15). Even if the Honorable Court of Appeals had been correct in holding the allegations loose and general, they would have been sufficient as Rule 9(b) plainly states, "Malice, intent, knowledge, and other condition of mind of a person may be averred generally. The so termed conclusions are ultimate statement of facts, and any difference of opinion on that is immaterial under the present rules. If the last statement of the opinion (R. 80) is allowed to remain unchallenged it will unsettle the current rules generally. Surely a litigant can rely on these rules.

## CONCLUSION

It is, therefore, respectfully submitted, that a writ of certiorari should be issued by this Honorable Court for the reasons stated and in the public interest, so that the

fundamental right of privacy in the home now lost to a large segment of the American People, be restored.

L. L. McGuire

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*Petitioners*

2531 Marvin

Dallas, Texas

## APPENDIX

*U.S.C. Tit. 28 § 1343 Civil Rights:*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948 C. 646, 62 Stat. 932.

*U.S.C. Tit. 8 § 43 Civil action for deprivation of rights:*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.

*U.S.C. Tit. 8 § 47 (3) Conspiracy to interfere with civil rights. Depriving persons of rights or privileges:*

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R. S. § 1980.

*U. S. C. Tit. 8 § 48. Same; action for neglect to prevent:*

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 47 of this title are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on

the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; * * * *. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. R. S. § 1981.

*Texas Penal Code Art. 3:*

Penalties must be affixed by written law—In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State.

*U. S. Constitution Amendment IV:*

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Texas Constitution Art. 1 Section 9:*

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizure or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

*Art. 34-7. Ordinance No. 4370:*

"Power to enter premises.—The fire Chief or any officer or member of the Fire Department designated by the Fire Chief shall have the right and authority to enter any building or upon any premises in the City of Dallas at any time during business hours for the purpose of making investigations consistent with the duties imposed herein."

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Office - Supreme Court,
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CHARLES ELMORE CRO

No. 252

In the

# Supreme Court of the United States

October Term, 1952

L. L. McGUIRE AND LENORE McGUIRE,
*Petitioners,*

*v.*

A. W. TODD, *et al.*,
*Respondents.*

## RESPONDENTS' BRIEF IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENTS' BRIEF IN ANSWER TO PETITION FOR WRIT OF CERTIORARI

---

*To the Honorable Supreme Court of the United States:*

Your Respondents are the officers of the City of Dallas, Texas, a municipal corporation:

A. W. Todd, Fire Inspector
F. W. Rhea, Fire Inspector
W. G. Burns, Fire Marshal
Frank O'Brien, City Judge
W. K. Chapman, Assistant City Attorney
Robert McBean, Assistant City Attorney
H. P. Kucera, City Attorney

The Petitioners are individuals, citizens, living within the City limits of the City of Dallas, Texas.

## STATEMENT OF THE CASE

Petitioners filed this suit against the Respondents in the District Court for an alleged violation of civil rights. They charged that the *City Attorney, Judge of the Corporation Court, two Assistant City Attorneys, two Fire Inspectors* and the *Fire Marshal* entered into a conspiracy to deprive them of their civil rights, in that the two Fire Inspectors entered upon the premises of Petitioner, L. L. McGuire, and demanded the right to inspect the premises for fire hazards. As a result of the refusal to permit the inspection, L. L. McGuire's mother was charged in Corporation Court, by a complaint sworn to by a Notary Public, of hindering and refusing to permit the inspection; was convicted in Corporation Court and upon appeal to the County Criminal Court, the complaint was later dismissed. Respondents interposed a Motion to Dismiss on the grounds of: (1) Lack of jurisdiction, (2) no cause of action was alleged, and (3) immunity of the officers involved. The District Court sustained the Motion to Dismiss and Petitioners appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the action of the Trial Court on the ground that the complaint did not allege a cause of action.

## REPLY TO JURISDICTIONAL STATEMENT

Petitioners invoke jurisdiction of this Court by merely citing Title 28, U. S. C. A. 1254(1). This is insufficient because that Article merely provides a method by which the judgment of the United States Court of Appeals can be

reviewed. The statement does not comply with Rule 38 of the Supreme Court of the United States. See *United States v. Rimer, 220 U. S. 547; Furness, Withy & Co. v. Yang Tsze Insurance Assn., 242 U. S. 430; Houston Oil Co. v. Goodrich, 245 U. S. 440; Layne & Bowler Corporation v. Western Well Works, 261 U. S. 387, 392; Magnum Import Co. v. Coty, 262 U. S. 159, 163; Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508.*

If it is the intention of the Petitioners to supply the deficiency by listing the "Questions Presented" (see page 5 of the Petition for Writ of Certiorari) then it is insufficient because it does not comply with Rule 12, Paragraph 1, Rules of the United States Supreme Court, which requires: (a) that the jurisdictional statement refer to the statutory provisions which sustain jurisdiction; (b) The statute of the State or the statute or treaty of the United States setting out verbatim or appropriately summarizing the pertinent provisions, if involved in the cause; and, (c) The date of the judgment, or decree sought to be reviewed and the date upon which the application is presented. (See *McArthur v. United States, 315 U. S. 787; Zucht v. King, 260 U. S. 174, 176-77.)*

WHEREFORE, your Respondents submit that no jurisdictional grounds have been set forth and that the Application for Writ of Certiorari should be dismissed.

H. P. KUCERA, *City Attorney,*
402 City Hall,
Dallas 1, Texas,
*Attorney for Respondents.*

No. 252

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In the
# Supreme Court of the United States
October Term, 1952

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L. L. McGUIRE AND LENORE McGUIRE,
*Petitioners,*

*v.*

A. W. TODD, *et al.*,
*Respondents.*

---

## RESPONDENTS' BRIEF AND ANSWER TO THE CLAIM THAT A CAUSE OF ACTION WAS ALLEGED UNDER THE CIVIL RIGHTS STATUTE

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Petitioners present six (6) separate grounds under which they claim that a cause of action has been alleged. For convenience we shall discuss grounds I, II, III, V, and VI as a group and ground Number IV separately.

Since the alleged unlawful entry or search under the circumstances raised in the Petition was made by the Fire Inspectors acting under *Articles 4897 and 4898, Texas Re-*

*vised Civil Statutes, 1925*, and *Ordinance No. 4370*, being the *Fire Code of the City of Dallas*, which the City of Dallas enacted under the authority of *Article 1068, Texas Revised Civil Statutes, 1925*, the entry or search was not unreasonable. *Article 1068, Texas Revised Civil Statutes, 1925*, particularly *Sections 1, 2, 7 and 10* provide as follows:

> "1. To prevent and prohibit the dangerous condition of chimneys, flues, fire-places, stove pipes, ovens or other apparatus used in or about any building or manufactory, and to cause the same to be removed or placed in a secure and safe condition.
>
> "2. To prevent the deposit of ashes where they would be liable to produce fire or in any wooden box or barrel, or barrel, or within any wooden building, and to appoint officers to enter into any building or inclosure to examine and discover whether the same are in a dangerous state, and to cause such as may be dangerous to be put in a safe condition.
>
> "7. To direct, control or prohibit the keeping and management of houses or any buildings for the storing of gun powder and other combustible, explosive or dangerous materials within the city; to regulate the keeping and conveying of the same.
>
> "10. And generally to establish such regulations for the prevention and extinguishment of fires as the city council may deem expedient."

Under *Section 5* of the *Charter of the City of Dallas*, which is an act of the Legislature and of which this Court takes judicial notice (see *City of Dallas v. Crippen, 171 F. 2d 526)*, power is granted to the city:

> "May adopt any ordinance or regulation having for its purpose the prevention of fires or the removal of fire hazards * * *."

Furthermore, *Article 1175, Section 27, Revised Civil Statutes, 1925*, confers powers upon cities to create a Fire and Police Department.

Not every search without a warrant is unlawful. The exigencies of the time and the occasion require, for the administration of justice, that searches be made without search warrants, such as an automobile may be searched without a search warrant that is suspected of transporting intoxicating liquors or is committing other violations of the law. Chief Justice Taft wrote, in part, in the case of *Carroll v. United States, 69 L. Ed. 543, 267 U. S. 132*, as follows:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The 4th Amendmant is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Neither do fires or fire hazards wait for search warrants. The purpose of the entry by two of the Respondents on the premises of the Petitioners was to detect possible fire hazards with a view of correcting them and no prosecution was contemplated. The Fire Code so plainly directs.

Cases supporting our view that such search and seizure are not unreasonable are as follows: *Karr v. Baldwin, 57*

*F. 2d 252*, which construes a Texas Statute; *New Way Lumber Company v. Smith, 128 Tex. 173; 96 S. W. 2d 282;* and *Hughes v. State, 149 S. W. 173*, a decision by the Texas Court of Criminal Appeals. See also *Leisy v. Hardin, 135 U. S. 100; 34 L. Ed. 128.*

A careful reading of the Complaint discloses that there is a total absence of:

(a) Any concerted willful action on the part of the Respondents to single out Petitioners, but merely states one isolated act which arose in a routine performance of inspection by the fire inspectors.

(b) That they are not charged with having acted according to a preconceived plan or scheme to prosecute or persecute the Petitioners.

(c) The allegations contained in Paragraph 6 of the Complaint (see Record, page 5) are tantamount to a charge of lack of equal protection of the law, which does not in itself state a cause of action, because the prohibition against denial of equal protection of the law is to prevent class legislation or action. To say that the Respondents conspired to deny the Petitioners due process of law is not a conspiracy to deny persons equal protection of the law within the meaning of that phrase as used in the Fourteenth Amendment. (See *Mitchell v. Greenough, 100 F. 2d 184.)*

The United States Court of Appeals for the Fifth Circuit in holding that the complaint of Petitioner did not state a cause of action, stated as follows:

"It is sufficient for us in this case to say: that, as other courts have done, we disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the de-

> fendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights; that the things defendants are alleged to have done, as distinguished from the conclusion of the pleaders with respect to them, do not (fol. 81) constitute a deprivation of the civil rights of plaintiffs, do not give rise to the cause of action claimed; and that the judgment dismissing the complaint should be affirmed."

We believe that under the authorities the judgment of the Circuit Court is well supported by the authorities, and in support thereof, we submit the following:

In the case of *Snowden v. Hughes, 321 U. S. 1, page 8.* Plaintiffs filed suit against various individuals who were election officials of the canvassing board of Cook County, Illinois, charging them with failure and refusal to proclaim the results of the election and to issue certificates of nomination to the successful candidate and further charged that they refused to certify his name as being the successful candidate. It was charged in the petition that such acts on the part of the canvassing board was *willful, malicious and arbitrary and that they had failed* and refused to file a correct certificate with the Secretary of State showing his nomination; that they conspired and confederated together for that purpose and that such action constituted an unequal, unjust and oppressive administration of the laws of the State of Lllinois. In holding that the complaint did not state a cause of action, the Court used the following language:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal

> application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

The Court continued on page 10 saying:

> "The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets 'willful' and 'malicious' applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust, and oppressive administration of the laws of Illinois."

This language should be sufficient answer to the claim that Federal Rule 9B does not supply the deficiency of the pleading.

In the case of *Love v. Chandler, 124 F. 2d 785*, an action was brought against Defendants, who were charged with conspiring against the complainant to prevent him from obtaining employment with the Works Progress Administration. It was charged that the Defendants conspired as either officers or agents of the United States, or the State of Minnesota, and subjected the Appellant to threats, assaults, insanity proceedings and temporary wrongful deprivation of liberty to prevent his employment. The Court in dismissing the Complaint said in part as follows:

> "The Appellant seeks damages because certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the Appellant are assault and battery, false imprisonment, and inter-

> ference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think, within the exclusive province of the State."

In the case of *Bottone v. Lindsley, 170 F. 2d 705*, an action was brought against the judge and lawyers who participated in a suit, unsuccessfully prosecuted by the Appellant, in the District Court of Colorado. It was alleged particularly that the State District Court wrongfully assumed jurisdiction of the subject matter, denying him a jury trial, and allowed a cross-claim. The Trial Court sustained a motion to dismiss on the grounds that the complaint did not state facts sufficient to constitute a claim upon which relief could be granted. The Plaintiff based his cause of action on *Sections 43 and 47 of Title 8, U. S. C. A.* In affirming the judgment of the Trial Court the Court said in part:

> "But Sections 43 and 47 grant separate and distinct rights of action. Section 43 does not give a cause of action for denial of equal protection of the laws, nor does Section 47 give a cause of action for denial of due process of law."

In the case of *Moffett v. Commerce Trust Company, 87 Fed. Supp. 438*, the Court reviewed a pleading very much like that in the present case, consisting of general allegations unsupported by factual data, and in holding said allegations insufficient, the Court used the following language:

> "In an important case, such as this, involving public officials, the averments of the complaint, as in cases of fraud, should not be mere conclusions of the pleader,

> but must state facts from which the conclusion is inevitably drawn that the state official did, in fact, use his office for the sole object or purpose of depriving the plaintiff of her constitutional rights. This is the rule for the reason that the law presumes the regularity of duty and the good faith of a public officer and it must appear from the averments of facts that he has departed from an upright and proper course of conduct."

On a retrial of the cause *(Moffett v. Commerce Trust Company, supra)*, the Court reviewed the amended pleading and again in holding it insufficient used, in part, the following language:

> "Moreover an examination of the entire complaint shows that it is wholly and entirely directed at individual conduct and only remotely involves state officials, and it is obvious from reading the complaint that these averments were placed there in order to bring the case within the statutes relied upon. The case of Picking v. Pennsylvania Railroad, 3 Cir., 151 Fed. 2d 240, does not change this viewpoint."

It might not be amiss to call the Court's attention to the adroitness resorted to by Petitioner L. L. McGuire in draftin the pleading in this case. Particularly, we desire to call the Court's attention to the last sentence of Paragraph 11 of the Complaint (see Record, page 8) wherein it alleges that Lenore McGuire was without legal education to enable her to *have a clear understanding of her constitutional rights.* Again at page 9 of the Record, Paragraph 14, the pleading discloses that L. L. McGuire had warned his mother Lenore McGuire to allow *no one to enter the house, garage, or on the premises* without *proper legal process,*

but being frightened and not knowing her rights, she allowed the inspector to enter the house. What is the purpose of such a pleading?

Cases of like import are: *Gregoire v. Biddle, 177 F. 2d 579;* and *Campo v. Niemeyer, 182 F. 2d 115.*

In the case of *Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495*, it appears that Defendant Screws, a sheriff enlisted the aid of Jones, a policeman, and Kelly, a special deputy, in arresting Robert Hall, a Negro citizen of the United States and a resident of the State of Georgia for an alleged tire theft. The accused was severely beaten and as a result died from the injuries received. Defendants were indicted under *Section 20 of the Criminal Code, 18 U. S. C. A.* The validity of the statute was challenged as being vague and indefinite and in reversing and remanding the cause for a new trial the Court considered what effect a too literal construction of the statute would have on honest law-enforcement officers and used the following language:

> "Under that test a local law enforcement officer violates section 20 and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee. The treacherous ground on which state officials —police, prosecutors, legislators, and judges—would walk is indicated by the character and closeness of decisions of this Court interpreting the due process clause of the Fourteenth Amendment." (Citing cases.)

The Court continued:

> "Those who enforced local law today might not know for many months (and meanwhile could find out) whether what they did deprives someone of due process of law. The enforcement of a criminal statute so construed would indeed cast law enforcement agencies loose at their own risk on a vast uncharted sea."

In the case of *Stefanelli v. Minard, 96 Law Edition 99*, the Supreme Court refused to stay by injunction the presentation of evidence in a State Court (New Jersey) in a criminal prosecution, which evidence was obtained in violation of the search and seizure provision of the Constitution. Plaintiffs in that suit invoked the civil rights statute as the basis of the suit, particularly *Title 8, U. S. C. A., Section 43*. The Court after discussing the various questions raised concluded that a Federal Court, sitting in equity, should not stay criminal proceedings pending in a State Court:

> "Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute 'should be construed so as to respect the proper balance between the States and the balance between the States and the federal government in law enforcement'."

The Court continued:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every

> State criminal prosecution to insupportable disruption. Every question of precedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The above language is significant in that it points out the hazards and the inevitable disruption that would result if the Federal Court had granted relief and stayed the trial. On the other hand let's consider a review by the United States Supreme Court of a conviction with the use of such evidence. Assume that such conviction would be reversed, then unless the participants in said trial, that is, the judge, jury, prosecutors and witnesses are given immunity they would be subject to a civil rights suit.

Footnote No. 12 to the above case calls attention to the civil rights cases of *Picking v. Pennsylvania Railroad Company, 151 F. 2d 240* and *McShane v. Moldovan, 172 F. 2d 1016*, in which causes of action were held to have been alleged in cases where the fairness of State court proceedings had been attacked in lower Federal Courts. However, we believe that the *Stefenelli v. Minard* case, supra, points out the dangers that such a practice or rule of law would generate with the inevitable result of paralyzing law en-

forcement by the sovereign states. Certainly the original purpose of the Civil Rights Statute was not such as is now contended for. The Supreme Court in the decision in the case of *Tenney v. Brandlove, 95 L. Ed. 1019, 341 U. S. 367,* which reversed the lower court and upon which Petitioners rely in this case, somewhat brings this character of litigation within its proper orbit. The Court very properly referred to the Civil Rights Statute as the Reconstruction Legislation which properly *should be construed and related to the problems* which it was sought to solve at the time it was enacted.

## RESPONDENTS' REPLY TO PETITIONERS' POINT IV

Under the record the City Attorney, his two Assistants, and the Judge of the Corporation Court are judicial officers set up under the Charter of the City of Dallas, which is a Special Act of the Legislature of the State of Texas, 1907, and has the effect of a State statute. (See *City of Dallas v. Crippen, 171 Fed. 2d 526.)* The Fire Marshal and his Deputies, the other Respondents herein, are likewise officers of the City of Dallas and the State in that the operation of a Fire Department by a City in the State of Texas is a governmental function. (See *Hooper v. City of Childress, 34 S. W. 2d 907.)* The Fire Marshal and his Deputies occupy offices created by the Fire Code Ordinance of the City of Dallas under the authority of State law. Under the authorities all of the Respondents are entitled to judicial immunity. Petitioner charges that the ordinance

under which Lenore McGuire was prosecuted was not a penal ordinance. (See Record, pages 17 through 40, inclusive) particularly Article 34-23, which reads as follows:

> "*Article 34-23.*—Penalty—Any person, firm or corporation violating any of the provisions of this title shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than Two Hundred ($200.00) Dollars. Each day such violation shall continue or be permitted shall be deemed a separate offense."

This Article uses the word "Title" and it applies to the whole Fire Code of the City of Dallas.

The Corporation Court of the City of Dallas clearly has jurisdiction of all violations of the Fire Code of the City of Dallas, and therefore, any prosecution instituted in that Court under that Code is clearly within its jurisdiction. Petitioners maintain that the Fire Code Ordinance is a civil regulation and not a penal one. We disagree with this contention. The penal provisions in the Fire Code are ample and, therefore, the contentions of the Petitioners in this respect are without foundation.

It will be noted that the maximum fine the Corporation Court can levy is Two Hundred and No/100 ($200.00) Dollars, and that is precisely the extent of the penalty prescribed in the Fire Code of the City of Dallas. Furthermore, the Texas State law under *Article 1195, Texas Revised Civil Statutes, 1925*, provides that corporation courts (city courts) shall have jurisdiction of all criminal cases arising within the territorial limits of the city under the

ordinances of the City and State laws, where the punishment is by fine only and where the maximum fine may not exceed Two Hundred and No/100 ($200.00) Dollars.

In determining what is, or what is not within the official scope of duties the Circuit Court in the case of *Cooper v. O'Connor, 99 F. 2d 135*, in holding that a Petition was insufficient to state a cause of action, which charged certain officials of the United States Treasury Department with violating Plaintiffs' civil rights, said as follows:

> "In determining the scope of official action regard must be had to the authority conferred; and this, as we have seen, embraces every action which may properly constitute an aid in the enforcement of the law. This language is equally applicable to the present case. The rules and regulations issued by the Comptroller of the Currency expressly provided for the reporting of evidence indicating criminal violations of the law by bank officers. These rules and regulations have been upheld as being within the authority of the Comptroller."

The court in dealing with the alleged conspiracy had this to say:

> "The question next arises whether appellant can maintain his action against appellees by joining them and alleging that they engaged in a conspiracy. Accusing appellees jointly, or by way of a count in conspiracy, gives appellant's case no more virtue than if he had proceeded against each appellee singly. The reason for the rule of immunity applies equally in one case as in the other. The essence of conspiracy is an agreement—together with an overt act—to do an unlawful act, or a lawful act in an unlawful manner. We have seen that each act done in the present

case was lawful and privileged upon the part of each appellee. Their combining to perform those acts was lawful and was essential to fearless and effective administration of the law."

The doctrine of immunity as to judges was recognized at an early date by decisions of this Court. (See *Bradley v. Fisher, 20 L. Ed. 646, 80 U. S. 357;* and *Alzua v. Johnson, 58 L. Ed. 142, 231 U. S. 107;* the same immunity was granted to prosecuting attorneys in the case of *Yaselli v. Goff, 12 F. 2d 396, affirmed 72 L. Ed. 395.*

In the case of *Phelps v. Dawson, 97 F. 2d 339*, the United States Court of Appeals for the Eighth Circuit reviewed a State statute of South Dakota similar in import to *Article 4897* and *Article 4898, Revised Texas Civil Statutes, 1925*, which prescribed the duties of the Fire Marshal. There the Fire Marshal instituted arson proceedings against the Plaintiff which resulted in an acquittal. Suit was brought against the Fire Marshal and his Deputies on the ground that they violated the civil rights of he Plaintiff. The Circuit Court held that the Fire Marshal and his Deputies were entitled to immunity from suits for damages in the same manner as judicial officers. From that opinion we quote as follows:

"The question here is whether a deputy Fire Marshal in making such a charge is liable for damages if he does so without probable cause and with malice. The answer must be that he is not. The reason is that, in

instituting such a charge, *he is acting in a so-called quasi-judicial capacity connected with the enforcement of the criminal law.* Broadly speaking, it is his official duty to institute such proceedings. His action in so doing is, under the statute, to be the result of his honest judgment based upon the results of his investigation. He has a choice—sometimes called a 'discretion'—to initiate or not to initiate such a criminal proceeding. The public welfare requires that this choice shall be free of all fear of personal liability. To assure this freedom of action it is deemed best to make that assurance positive and definite by securing him against even actions based upon a malicious abuse of his official power.

"Counsel have not cited and we have been unable to find any decision of the Supreme Court of South Dakota bearing upon the issue here. Hence, we are compelled to determine this issue by the law as stated in other jurisdictions. This rule of law has been frequently announced and is established. Yaselli v. Goff, 275 U. S. 503, 48 S. Ct. 155, 72 L. Ed. 395, affirming 2 Cir., 12 F. 2d 396, 56 A. L. R. 1239; Alzua v. Johnson, 231 U. S. 106, 111, 34 S. Ct. 27, 58 L. Ed. 142; Spalding v. Vilas, 161 U. S. 483, 16 S. Ct. 631, 40 L. Ed. 780; Bradley v. Fisher, 13 Wall. 335, 347, 20 L. Ed. 646; Lang v. Wood, 67 App. D. C. 287, 92 F. 2d 211. Also see Brown v. Rudolph, 58 App. D. C. 116, 25 F. 2d 540, 541, certiorari denied, 277 U. S. 605, 48 S. Ct. 601, 72 L. Ed. 1011. This rule finds its genesis in the necessary protection of courts in the impartial uninfluenced discharge of judicial duties. The principle has been extended to include certain other officials who are necessary implements in enforcing the criminal laws—such as grand jurors (Yaselli v. Goff, 2 Cir., 12 F. 2d 396, 403, 56 A. L. R. 1239; Sidener v. Russell, 34 Ill. App. 446; Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001; Hunter v. Mathis, 40 Ind. 356; Engelke v. Chouteau, 98 Mo. 629, 12 S. W. 358; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep.

48; Ullman v. Abrams, 9 Bush., Ky., 738; Black v. Sugg, 3 Ky. 556, Hardin 556; 1 Hawkins' Pleas of the Crown 349) petit jurors (Yaselli v. Goff, 2 Cir., 12 F. 2d 396, 403, 56 A. L. R. 1239; 1 Hawkins' Pleas of the Crown 349) and (although there is early authority to the contrary) various kinds of prosecutors (Yaselli v. Goff, 2 Cir., 12 F. 2d 396, 399, 56 A. L. R. 1239; Watts v. Gerking, 111 Or. 641, 654, 222 P. 318, 228 P. 135, 34 A. L. R. 1489; Smith v. Parman, 101 Kan. 115, 165 P. 663, L. R. A. 1917F, 698; Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001; Anderson v. Manley, 181 Wash. 327, 43 P. 2d 39; Pearson v. Reed, 6 Cal. App. 2d 277, 44 P. 2d 592; Semmes v. Collins, 120 Miss. 265, 82 So. 145; Ostman v. Bruere, 141 Mo. App. 240, 124 S. W. 1059). In Brown v. Rudolph, 58 App. D. C. 116, 25 F. 2d 540, certiorari denied, 277 U. S. 605, 48 S. Ct. 601, 72 L. Ed. 1011, the rule was applied by the Court of Appeals for the District of Columbia to the Commissioners of the District who had filed lunacy proceedings against the plaintiff.

"When we consider the statutory duty of the deputy Fire Marshal to investigate fires and to initiate prosecutions for arson; the character of those duties; and the effect of the exercise thereof upon the protection of the public from a serious crime, we think the exercise of such duties requires, for the public protection, immunity from personal liability. Such duties are within the principle of the above rules of law. Since the Fire Marshal is charged only because he was the superior officer of the deputy who initiated this arson charge, it follows that he too cannot be held liable under this petition. This disposes of the appeal from the judgment entered in favor of these two individual defendants."

From the decisions cited in the *Phelps v. Dawson* case, supra, it is quite apparent that the doctrine of immunity

has various applications and that under the facts of this case all of the Respondents are immune from the damage suit here.

## CONCLUSION

WHEREFORE, your Respondents respectfully pray that this Application for Writ of Certiorari to the Supreme Court of the United States be denied for want of jurisdiction over the subject matter and parties, and in the alternative, because the complaint fails to state a cause of action against the Respondents upon which relief can be granted.

Respectfully submitted,

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End